IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. .....

RALPH WAGNER,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is printed in the record at pages 146 to 150.

Jurisdiction.

The judgment of the Circuit Court of Appeals was rendered on April 8, 1941, and amended on May 19, 1941. This court has jurisdiction under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925.

Statement.

A full statement appears in the petition and in the interest of brevity is not repeated here.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the petitioner had the benefit of a fair trial, and in holding that a failure of the prosecution to establish its major premise upon which the charge was based, viz., that the partnership theory was resorted to by the petitioner as a vehicle for the fraud, did not justify the reversal of the judgment and sentence imposed upon the petitioner by the trial court.

2. The Circuit Court of Appeals erred in holding that where there is presented to the Circuit Court, in a Criminal Case, a Motion for a New Trial or to Remand, "solely upon the ground of newly-discovered evidence," as provided by the Rules of Practice and Procedure, etc., in Criminal Cases, the Circuit Court has the *discretionary* right to remand or to refuse to remand the case to the trial court to the end that the motion for new trial may be ruled.

3. The Circuit Court of Appeals erred in denying to petitioner, who had appealed from the judgment of the trial court, "within five (5) days after the entry of judgment of conviction," the right to move for a new trial and have that motion ruled by the trial court.

4. The Circuit Court of Appeals erred in holding that the Circuit Court and not the trial court should decide on the sufficiency of the affidavits and the probable effect on a new trial of the evidence set out in the affidavits appended to the motion for a new trial.

ARGUMENT.

I.

The Petitioner Did Not Have a Fair Trial Because of the Failure of the Prosecution to Establish Its Major Premise That the Petitioner Had Fabricated the Partnership Idea for the Purpose of Evading the Payment of Income Tax.

Specification of Error No. 1 will be discussed hereunder.

Citation of authorities other than those set out on page 13 of the foregoing petition are unnecessary to support this contention. Argument of a more persuasive character than that set out in the opinions in those cited cases could not be made and we therefore submit the matter on those authorities.

The opinion of the Circuit Court concludes as follows:

> "The 'reasons' (advanced on petitioner's appeal to the Circuit Court for a reversal of the judgment) given are wholly without merit and are too flimsy to justify further comment. There is much in the record tending to prove deliberate fabrication of evidence in building up the taxpayer's indebtedness." [R. 150.]

Such a conclusion is not justified. Even if there had been "deliberate fabrication of evidence in building up the taxpayer's indebtedness," as stated in the opinion of the Circuit Court [R. 150], it does not follow that the charge in the indictment is sustained. The indictment, itself, declares that in the return filed by the petitioner the petitioner stated "specifically the items of deductions . . . allowed to him by said Revenue Act for said calendar year to have been *none*," and stated in said return that there were "no other items of deductions." [R. 5.]

The defendant in the trial court, the petitioner here, specifically declared in the income tax return that he claimed no deductions from the amount set up on his return as being his gross income. For that reason any "deliberate fabrication of evidence in building up the taxpayer's indebtedness" would not justify the conviction here.

II.

The Circuit Court Had No Discretionary Right to Remand or to Refuse to Remand the Case to the Trial Court, to the End That the Motion for a New Trial Might Be Ruled; Petitioner Was Entitled as a Matter of Right to Have the Trial Court Rule on the Motion for a New Trial.

Specifications of Errors Nos. 2 and 3 will be discussed hereunder.

The following rules from Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases, promulgated by this court on May 7, 1934, are important in this discussion:

> "II. Motions.
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> "(3) A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.
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"III. Appeals. An appeal shall be taken within five (5) days after entry of judgment of conviction, . . .

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"Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. . . .

"IV. Control by Appellate Court. The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, . . .

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, . . ."

As soon as the notice of appeal was filed with the clerk of the trial court and such notice was by him filed with the clerk of the appellate court, the appellate court obtained the right to supervise and control the proceedings, and the trial court lost jurisdiction, except for the purpose of perfecting the record in aid of the appellate court's jurisdiction.

Obviously, under the rules, a defendant who has not appealed and who moves for a new trial solely upon the ground of newly discovered evidence before the trial court, within the sixty-day period after final judgment, has the absolute right to compel the trial court to consider and rule upon that motion.

The rules, however, as they have been interpreted by the Circuit Court in this action, seem to discriminate

against a defendant who has appealed by leaving it to the *discretion* of the Circuit Court as to whether or not the trial court may consider and rule upon a motion for a new trial.

Inasmuch as it is a *right* of persons convicted of crime who do *not* appeal from the judgment, to use newly-discovered evidence to effect a new trial, it certainly ought to be, and we think is, a *right* of persons convicted of crime who *do* appeal, to use newly-discovered evidence as a basis for obtaining a new trial.

To illustrate: A man may be convicted and prosecute no appeal. Within sixty (60) days after judgment he moves for a new trial upon newly discovered evidence, which evidence we shall assume is most clear and convincing of his innocence. The trial court would be compelled to hear and rule upon that motion for a new trial.

If that same man, under the same circumstances had appealed, the trial court would immediately lose jurisdiction, except to assist in completing the record on appeal and, under the decision of the Circuit Court, that court could use its own "discretion" to remand the case or not, and the exercise of discretion against remanding the case to the lower court would be an effective denial of the motion for a new trial.

"That a new trial should ordinarily be granted because of newly-discovered evidence," is elementary, declared the Eighth Circuit Court of Appeals in *Johnson v. United States,* 32 Fed. (2d) 127.

If an appellate court affirms a judgment it becomes final unless an appeal is taken. If a non-appealing defendant has a right to move for a new trial within sixty (60) days after the lower court's judgment becomes final, certainly

an appealing defendant should have that same right after the case is back in the District Court from the affirming opinion of the appellate court. The decision of the Circuit Court in this case cuts off that right, and in so doing penalizes the appealing defendant.

III.

The Circuit Court Erred in Holding That It and Not the Trial Court Should Decide the Sufficiency of the Affidavits Supporting the Motion for a New Trial and Should Decide the Probable Effect on a New Trial of the Evidence Set Out in Those Affidavits.

Specification of Error No. 4 will be discussed hereunder.

Affidavits in support of a motion for a new trial on the grounds of newly-discovered evidence have a fourfold purpose; (1) to show the nature of the evidence newly discovered, (2) to show whether or not due diligence was used in discovering the evidence, (3) to enable the *trial* court, who first heard and observed the witnesses, to say whether or not the newly-discovered evidence might have shaken the credibility of those witnesses and might have affected the decision of the trial court in the first instance, and (4) to enable the *trial* court to say how the newly-discovered evidence would probably affect the result of a new trial.

It is difficult to understand how the Circuit Court could say, from an examination of the affidavits submitted in

support of the motion for a new trial, that such evidence would or would not "probably produce an acquittal." To sustain such conclusion by the Circuit Court would be to permit the Circuit Court to determine how the trial court would exercise its discretion in ruling upon the motion for a new trial.

The ruling of a trial court on a motion for a new trial is discretionary. The discretion of the trial court is never overridden by the appellate court unless there be a clear abuse of discretion on the part of the trial court.

In ruling upon the motion for a new trial or to remand, the appellate court need only determine whether or not the matters set out in the affidavits in support of the motion justify the appellate court in remanding the case to the trial court. If the case is remanded it is then up to the trial court to determine from the affidavits that may have been filed up to that moment whether or not a new trial should be granted.

The fact that the rule itself provides for the remanding of a case to the trial court for ruling on the motion for a new trial clearly demonstrates that it was never the intention that the appellate court should rule on that motion, or on the sufficiency of the affidavits or their probable effect on a new trial. If it were intended that the appellate court should rule on the sufficiency of the affidavits and their probable effect on a new trial there would be no necessity of remanding any case to the lower court for such ruling.

Conclusion.

Petitioner now stands convicted and sentenced to serve a penitentiary term of two years and to pay a fine of $2,500. He was convicted of an offense not charged in the indictment and, under the decision of the Circuit Court and because of his appeal from the judgment of conviction, was denied that right to move for a new trial and to have that motion ruled by the trial court, a right which is accorded under the law and court rules to defendants who do not appeal in criminal cases.

The Writ of Certiorari should issue.

Respectfully submitted,

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Attorney for Petitioner.